

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

RES Physical Medicine & Rehab. Services
(Applicant)

- and -

Allstate Insurance Company
(Respondent)

AAA Case No. 17-17-1069-2588

Applicant's File No. n/a

Insurer's Claim File No. 0431002245
2HY

NAIC No. 19232

ARBITRATION AWARD

I, Marianne C. Zack, the undersigned arbitrator, designated by the American Arbitration Association pursuant to the Rules for New York State No-Fault Arbitration, adopted pursuant to regulations promulgated by the Superintendent of Insurance, having been duly sworn, and having heard the proofs and allegations of the parties make the following **AWARD**:

Injured Person(s) hereinafter referred to as: EIP

1. Hearing(s) held on 10/24/2018
Declared closed by the arbitrator on 10/24/2018

Shannon Fuhrman from Fuhrman Law participated by telephone for the Applicant

Megan McDonough from Law Offices of John Trop participated by telephone for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 1,016.22**, was NOT AMENDED at the oral hearing.
Stipulations WERE made by the parties regarding the issues to be determined.

The parties stipulated to the 7/29/2017 date of commencement of this arbitration.

3. Summary of Issues in Dispute

The Assignor ("EIP"), a 74-year-old- male, was injured in a motor vehicle accident that occurred on 9/11/2016. Following the accident, EIP suffered headaches and dizziness and neck and back pain, which resulted in him seeking treatment. In dispute is an invoice in the amount of \$1,016.22 for trigger point injections administered by Applicant to EIP on 3/22/2017 and 4/12/2017. Respondent denied reimbursement of the bill based on the peer review report of Dr. Germaine N. Rowe, dated 4/25/2017.

The hearing in this matter was conducted without any witnesses. This award is based upon hearing the oral arguments of representatives of both parties and upon a full review of the of the documents contained in the electronic case file as of the date of the Award.

An arbitrator "shall be the judge of the relevance and the materiality of the evidence offered, strict conformity to the rules of evidence shall not be necessary. The arbitrator may question or examine any witness or party and independently raise any issue that arbitrator deems relevant to making an award that is consistent with the Insurance Law and Department regulations." 11 N.Y.C.R.R. 65-45 (o) (1). Additionally, as the trier of the facts and the law, an Arbitrator is authorized to review and take judicial notice of any rule, law, medical document or periodical or any other document which may impact and aid in making a decision, as long as it conforms to the Insurance laws and the New York State Insurance Department Regulations. *Matter of Medical Society v. Serio*, 100 NY2d 854, 768 NYS2d 423 (2003).

4. Findings, Conclusions, and Basis Therefor

On 4/25/2017, Dr. Rowe performed a peer review of the EIP's treatment and records to provide his opinion as to the medical necessity of the injections. In that report, Dr. Rowe concludes that the injections were not medical necessary because the documentation does not indicate that EIP was engaged in conservative treatment. He further states that the claimant has some improvement in pain after the injection administered on 3/29/2017.

When an insurer uses a peer review as a basis for the denial, the peer review report must contain (1) evidence of the applicable generally accepted medical/professional standards, and (2) a statement or statements by the peer reviewer, based upon his or her application of the facts of the case, which set forth the provider's departure from those standards. *Acupuncture Prima Care v. State Farm Mut. Auto. Ins. Co.*, 17 Misc. 3d 1135(A) [Dist. Ct., 1st Dist., Nassau Co., 2007]; *Nir v. Allstate Ins. Co.*, 7 Misc. 3d 544 (NYC Civ. Ct., Kings Co., 2005).

If the insurer presents sufficient evidence establishing a lack of medical necessity, then the burden shifts back to the Applicant to present its own evidence of medical necessity. See *Tremont Med. Diagnostic, P.C. v. Geico Ins.*, 824 N.Y.S.2d 759 (App.Term 2d Sept. 29, 2006). In order for the Applicant to prove that the disputed expense was medically necessary, it must meaningfully refer to, or rebut, the Respondent's evidence. See *Yklik, Inc. v. Geico Ins. Co.*, 958 N.Y.S.2d 64 (App.Term 2d July 29, 2010).

The peer review report is insufficient to satisfy Respondent's burden. Contrary to Dr. Rowe's statements in the peer review, there is evidence that EIP was engaged in a course of chiropractic treatment at the time the injections were administered. In addition, the uploaded medical records indicate that EIP was engaging in an at-home exercise program and self-stretching protocol. Finally, the injections were providing a palliative benefit, which is compensable under no-fault.

Award in favor of Applicant as to medical necessity.

Fee Schedule:

Respondent has uploaded the affidavit of Jeffrey Futoran, certified professional coder, in support of its fee schedule defense. In that affidavit, Respondent adequately establishes that the proper amount to be billed for the injections is \$687.60.

I find nothing offered by Applicant which meaningfully rebuts Respondent's fee schedule calculations.

I award in favor of Applicant in the amount of \$687.60.

5. Optional imposition of administrative costs on Applicant.
Applicable for arbitration requests filed on and after March 1, 2002.

I do NOT impose the administrative costs of arbitration to the applicant, in the amount established for the current calendar year by the Designated Organization.

6. **I find as follows with regard to the policy issues before me:**

- ☐ The policy was not in force on the date of the accident
- ☐ The applicant was excluded under policy conditions or exclusions
- ☐ The applicant violated policy conditions, resulting in exclusion from coverage
- ☐ The applicant was not an "eligible injured person"
- ☐ The conditions for MVAIC eligibility were not met
- ☐ The injured person was not a "qualified person" (under the MVAIC)
- ☐ The applicant's injuries didn't arise out of the "use or operation" of a motor vehicle
- ☐ The respondent is not subject to the jurisdiction of the New York No-Fault arbitration forum

Accordingly, the applicant is AWARDED the following:

A.

Medical		From/To	Claim Amount	Status
	RES Physical Medicine & Rehab. Services	03/22/17 - 04/12/17	\$1,016.22	Awarded: \$687.60
Total			\$1,016.22	Awarded: \$687.60

- B. The insurer shall also compute and pay the applicant interest set forth below. 07/29/2017 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Applicant is awarded interest pursuant to the no-fault regulations. See generally, 11 NYCRR §65-3.9. Interest shall be calculated "at a rate of two percent per month, calculated on a pro rata basis using a 30-day month." 11 NYCRR §65-3.9(a). A claim becomes overdue when it is not paid within 30 days after a proper demand is made for its payment. However, the regulations toll the accrual of interest when an applicant "does not request arbitration or institute a lawsuit within 30 days after the receipt of a denial of claim form or payment of benefits calculated pursuant to Insurance Department regulations." See, 11 NYCRR 65-3.9(c). The Superintendent and the New York Court of Appeals has interpreted this provision to apply regardless of whether the particular denial at issue was timely. *LMK Psychological Servs., P.C. v. State Farm Mut. Auto. Ins. Co.*, 12 N.Y.3d 217 (2009).

C. Attorney's Fees

The insurer shall also pay the applicant for attorney's fees as set forth below

Applicant is awarded statutory attorney fees pursuant to the no-fault regulations. See, 11 NYCRR §65-4.5(s)(2). The award of attorney fees shall be paid by the insurer. 11 NYCRR §65-4.5(e). Accordingly, "the attorney's fee shall be limited as follows: 20 percent of the amount of first-party benefits, plus interest thereon, awarded by the arbitrator or the court, subject to a maximum fee of \$1360." *Id.* However, if the benefits and interest awarded thereon is equal to or less than the respondent's written offer during the conciliation process, then the attorney's fee shall be based upon the provisions of 11 NYCRR 65-4.6(b).

- D. The respondent shall also pay the applicant forty dollars (\$40) to reimburse the applicant for the fee paid to the Designated Organization, unless the fee was previously returned pursuant to an earlier award.

This award is in full settlement of all no-fault benefit claims submitted to this arbitrator.

State of New York

SS :

County of Erie

I, Marianne C. Zack, do hereby affirm upon my oath as arbitrator that I am the individual described in and who executed this instrument, which is my award.

11/16/2018
(Dated)

Marianne C. Zack

IMPORTANT NOTICE

This award is payable within 30 calendar days of the date of transmittal of award to parties.

This award is final and binding unless modified or vacated by a master arbitrator. Insurance Department Regulation No. 68 (11 NYCRR 65-4.10) contains time limits and grounds upon which this award may be appealed to a master arbitrator. An appeal to a master arbitrator must be made within 21 days after the mailing of this award. All insurers have copies of the regulation. Applicants may obtain a copy from the Insurance Department.

ELECTRONIC SIGNATURE

Document Name: Final Award Form
Unique Modria Document ID:
18edf8590926ec8aea55dae03acb68e5

Electronically Signed

Your name: Marianne C. Zack
Signed on: 11/16/2018